Supreme Court, U.S.
FILED
APR 9 1993
OFFICE

No. 92-1428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Petitioner,

v.

TRACY TEMPLETON,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM J. BURKE
Counsel of Record
JAMES T. DEMOS
LINDA LEONETTI-GRAVES
DEMOS & BURKE
77 West Wacker Drive
Suite 600
Chicago, Illinois 60601
(312) 263-4388
Counsel for Respondent

Of Counsel:
DAVID A. NOVOSELSKY
DAVID A. NOVOSELSKY & ASSOCIATES
120 North LaSalle Street
Suite 1400
Chicago, Illinois 60602
(312) 346-8930

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

Did the Federal Railroad Administration, in a Policy Statement issued in 1978, preempt OSHA from enforcing its "fall protection" regulations as to railroad bridge work.

TABLE OF CONTENTS

		PAGE
QUESTION PRESENTED		i
TABLE OF AUTHORITIES		iv
INTRODUCTION		1
STATEMENT OF FACTS		2
REASONS FOR DENYING THE WRIT		5
I.	THE ILLINOIS SUPREME COURT'S OPINION IS CONSISTENT WITH BOTH THE LEGISLATIVE AND REGULATORY SCHEMES WITH REGARD TO THE JURISDICTIONAL BOUNDARIES BETWEEN FRA AND OSHA	5
II.	FEDERAL PRECEDENT DOES NOT SUPPORT A TERRITORIAL APPROACH TO FRA REGULATION	7
III.	THE FRA'S 1978 POLICY STATEMENT DID NOT PREEMPT OSHA FROM ALL ASPECTS OF BRIDGE WORK	8
IV.	THE ILLINOIS SUPREME COURT CORRECTLY RELIED ON THE 1991 NPRM TO INTERPRET THE 1978 POLICY STATEMENT	11
V.	THE DISSENTING OPINION IN THE STATE COURT MISINTERPRETED THE 1978 POLICY STATEMENT	12
VI.	FEDERAL CASE LAW DOES NOT SUPPORT FRA'S EXCLUSIVE JURISDICTION OVER RAILROAD BRIDGES	15
VII.	THERE ARE NO STATEMENTS OF FRA INTENT WHICH ARE INCONSISTENT WITH THE ILLINOIS COURT'S OPINION	18

VIII. THE 1991 NPRM IS ENTITLED TO GREAT DEFERENCE 21

A. THERE IS NO PER SE RULE AGAINST UTILIZING AN AGENCY'S SUBSEQUENT INTERPRETATION OF ITS OWN REGULATION 21

B. THE 1991 NPRM IS NOT A RETROACTIVE INTERPRETATION OF THE 1978 POLICY STATEMENT 24

IX. NOTHING IN THE ILLINOIS SUPREME COURT'S OPINION IS VIOLATIVE OF NORTH WESTERN'S RIGHT TO DUE PROCESS 27

CONCLUSION 29

RESPONDENT'S APPENDIX RA1

TABLE OF AUTHORITIES

Cases: PAGE

Templeton v. Chicago & N.W. Transp. Co.,
151 Ill. 2d 325, 603 N.E.2d 441 (1992) 11,12,15

Atchison, T. & S.F. R.R. v. Wichita Bd. of Trade,
412 U.S. 800 (1973) 24,25

Bowles v. Seminole Rock Co.,
325 U.S. 410 (1945) 22

Corbesco, Inc. v. Dole,
926 F.2d 422 (5th Cir. 1991) 28,29

Drew v. Lawrimore,
257 F.Supp. 659 (D.C.S.C. 1966) 23

Faultless Division v. Secretary of Labor,
674 F.2d 1177 (7th Cir. 1982) 27

Fluor Constructors, Inc. v. OSHA Review Comm'n,
861 F.2d 936 (6th Cir. 1988) 29

Gardebring v. Jenkins,
485 U.S. 415 (1988) 11,23,24

Heckler v. Community Health Serv.,
467 U.S. 51 (1984) 24,25

Land O'Lakes Creameries, Inc. v. Commodity Credit Corp.,
265 F.2d 163 (8th Cir. 1959) 23

Matter of Sinclair,
870 F.2d 1340 (7th Cir. 1989) 24

NLRB v. Bell Aerospace Co.,
416 U.S. 267 (1974) 24,25

Norfolk & W. Ry. v. Burns,
587 F.Supp. 161 (S.D. Mich. 1984) 16,17

Norfolk & W. Ry. v. Public Utilities Comm'n of Ohio,
727 F.Supp. 367, *aff'd*, 926 F.2d 567 (6th Cir. 1991) 16

Order of Railway Conductors v. Swan,
152 F.2d 325 (7th Cir. 1945), *aff'd*, 329 U.S. 520 (1947) 23

San Luis Obispo v. NRC,
789 F.2d 26 (D.C. Cir. 1986) 22

SEC v. Chenery Corp.,
322 U.S. 194 (1947) 24,25

Secretary of Labor v. Consolidated Rail Corp.,
10 OSHC 1577 (1982) 17,18,19

Secretary of Labor v. Consolidated Rail Corp.,
OSHRC Docket No. 78-2119, *aff'd on other grounds*,
9 OSHC 1892 (1981) 14,17,18,28

Southern Pacific Transp. Co. v. Public Utilities Comm'n of California,
647 F.Supp. 1220, *aff'd per curiam*,
820 F.2d 1111 (9th Cir. 1987) 9

Southern Pacific Transp. v. Usery,
539 F.2d 386 (5th Cir. 1976), *cert. denied*,
434 U.S. 874 (1977) 5,7,16

Texas E. Prods. Pipeline Co. v. OSHA Review Comm'n,
827 F.2d 46 (7th Cir. 1987) 29

Udall v. Tallman,
380 U.S. 1 (1965) 22

Velasquez v. Southern Pacific Transp. Co.,
734 F.2d 216 (5th Cir. 1984) 15,29

Wisconsin Cheesemen, Inc. v. United States,
388 F.2d 420 (7th Cir. 1968) 24

Youakim v. Miller,
425 U.S. 231 (1976), *aff'd after remand*,
440 U.S. 125 (1979) 23

Statutes:

29 U.S.C. §651 *et seq.* (1970) 5
29 U.S.C. §653(b)(1) 5
45 U.S.C. §431(n) (1988) 20

Miscellaneous:

29 C.F.R. §1910.23 9
29 C.F.R. §§1926.104-1926.105 11
43 Fed.Reg. 10583-90 (1978) 3,6,8,9,11,13,14,15,22,28
56 Fed.Reg. 3434-41 (1991) 4,10,21,26
57 Fed.Reg. 28116 (1992) 2

No. 92-1428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Petitioner,

v.

TRACY TEMPLETON,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

In its opinion below, the Illinois Supreme Court carefully addressed each of North Western's assignments of error, including its claim that the OSHA "fall protection" regulations should not have been admitted as evidence of negligence because the FRA had preempted those regulations from being applied to bridge work. In reaching its conclusion that the OSHA regulations were properly admitted, the Illinois Supreme Court applied settled federal precedent and long established principles of judicial interpretation with regard to the determination of an administrative agency's intent.

North Western now seeks to have this Court review the Illinois Supreme Court's decision. Cognizant of this Court's enumeration of the factors necessary to invoke certiorari jurisdiction, North Western attempts to bring the Illinois Supreme Court's opinion in conflict with federal precedent. However, that attempt is unavailing. Not only do those cases fail to support North Western's position, but none of them even considered the OSHA "fall protection" regulations at issue in this case.

Further, North Western attempts to portray this case as one which involves an important question of federal law which needs to be settled by this Court. However, the specific issue posed, whether FRA has preempted OSHA from enforcing its fall protection regulations on railroad bridges, has been resolved for future cases by the FRA's adoption of its own "fall protection" regulations which took effect on August 24, 1992. 57 Fed.Reg. 28116 (1992). Given the FRA's express exercise of authority over this working condition in 1992, there is no doubt that today OSHA is precluded from enforcing its fall protection regulations in the railroad industry. Therefore, the effects of any action taken by this Court will be felt in this case alone. There is no important question of federal law that needs to be settled by this Court.

In short, North Western's Petition for Writ of Certiorari does not establish a need for this Court's review. The Petition for Writ of Certiorari should be denied.

STATEMENT OF FACTS

Tracy Templeton, was an employee of the Chicago & North Western Transportation Company (North Western). On January 27, 1984, Mr. Templeton was severely injured

when he fell 31 feet through an opening in the deck of a railroad bridge. Contrary to North Western's fact statement, Mr. Templeton was not provided with any fall protection devices such as safety belts or nets. The evidence revealed that there were no nets and only two safety belts available for the seven member crew. The two safety belts were reserved for the exclusive use of those who had to work beneath the bridge deck. (Trial transcript, pp. 551-52, 554).

PROCEEDINGS IN THE TRIAL COURT

At trial, Respondent offered into evidence industry standards on fall protection from the Burlington Northern Railroad, the Union Pacific Railroad, the National Safety Council, the U.S. Army Corp of Engineers and OSHA. Those standards were virtually identical to each other and required that fall protection devices in the form of nets or safety belts be used whenever a worker is working higher than twenty-five feet above any work surface.

Of the five fall protection standards offered in evidence, North Western only objected to the admission of the OSHA standards. Its objection was based on its belief that a Policy Statement issued by the FRA in 1978 preempted OSHA from enforcing its "fall protection" regulations as to railroad bridge work. 43 Fed.Reg. 10583-90 (1978). The trial court considered all arguments and concluded that the Policy Statement did not preempt OSHA from enforcing those regulations on railroad bridges. The trial court admitted those regulations as evidence of negligence. The jury returned a verdict for Respondent in the amount of 3.5 million dollars after a reduction for the jury's finding that he was 14% negligent.

PROCEEDINGS IN THE ILLINOIS APPELLATE COURT

North Western appealed from the trial court's judgment. In 1991, during the pendency of that appeal, the FRA issued a Notice of Proposed Rulemaking (NPRM) in which it confirmed that OSHA's fall protection regulations had not been preempted by the 1978 Policy Statement. 56 Fed.Reg. 3434-41 (1991).

The appellate court misread the 1978 Policy Statement and reversed the judgment of the trial court without addressing the specific language in the 1991 NPRM wherein the FRA confirmed the trial court's reading of the Policy Statement.

PROCEEDINGS IN THE ILLINOIS SUPREME COURT

The Illinois Supreme Court recognized the error made by the appellate court and granted leave to appeal. The high court looked unsuccessfully to the 1978 Policy Statement to determine if it contained an answer to the question of whether OSHA's fall protection regulations were preempted from railroad bridge work. Therefore, the court relied upon the 1991 NPRM as a valid expression of FRA intent. The Illinois Supreme Court correctly paid deference to the 1991 NPRM and reversed the judgment of the appellate court.

REASONS FOR DENYING THE WRIT

I. THE ILLINOIS SUPREME COURT'S OPINION IS CONSISTENT WITH BOTH THE LEGISLATIVE AND REGULATORY SCHEMES WITH REGARD TO THE JURISDICTIONAL BOUNDARIES BETWEEN FRA AND OSHA

In its attempt to create an important question of federal law North Western claims that the decision of the Illinois Supreme Court promotes "overlapping OSHA/FRA jurisdiction over railroad operations in derogation of national transportation policy." (Pet. at 14).[1] To the contrary, the Illinois Supreme Court's opinion is entirely consistent with that policy.

In 1970, Congress passed the Occupational Safety and Health Act. 29 U.S.C. §651 *et seq.* While Congress wanted to avoid duplication of regulatory efforts by OSHA and other administrative agencies, it had an even greater desire to avoid safety problems created by gaps in regulation. *Southern Pacific Transp. Co. v. Usery*, 539 F.2d 386, 392 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977). With this in mind, Congress drafted Section 4(b)(1) of OSHA so as to prevent an industry from being exempt from OSHA regulation until the federal agency responsible for that industry actually exercised its authority to provide safety. Section 4(b)(1) of OSHA provides that regulations promulgated thereunder shall not apply to "working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards." 29 U.S.C. §653(b)(1).

---

[1] References to the Petition for Certiorari are noted as "(Pet. at p. ____)." Page numbers in parenthesis preceded by "A" refer to pages from North Western's Appendix.

The FRA has never exercised its statutory authority to the extent of totally displacing OSHA. Rather, the FRA has expressly embraced overlapping jurisdiction of OSHA and the FRA as to railroad safety. In its 1978 Policy Statement the FRA conceded that OSHA, with its comprehensive standards, was better suited than the FRA to provide safety for many aspects of the railroad industry. North Western, however, failed to include that portion of the Policy statement in its Appendix:

> [G]iven the present staffing level for field investigation and inspection, the FRA has determined that, at this time, it would not be in the best interests of the public and of railroad safety for this agency to become involved extensively in the promulgation and enforcement of a complex regulatory scheme covering in minute detail, as do the OSHA standards, working conditions which, although located within the railroad industry, are in fact similar to those of any industrial workplace. Rather, we believe that the proper role for FRA in the area of occupational safety in the immediate future is one that will concentrate our limited resources in addressing hazardous working conditions in those traditional areas of railroad operations in which we have special competence.

43 Fed.Reg. at 10585.

Further, contrary to North Western's assertion, nothing in the Illinois Supreme Court's decision conflicts with federal precedent delineating the jurisdictional relationship between OSHA and the FRA. The Respondent, Petitioner and the Illinois Supreme Court all agree with existing federal precedent that the regulations promulgated under the OSH Act are inapplicable when an industry-specific agency, such as the FRA, actually exercises its authority over the same working condition covered by an OSHA regulation or specifies that such working condition should go

unregulated. The sole issue in this case is not whether the FRA *can* preempt OSHA, but whether or not it had done so in 1978 with regard to the "fall protection" regulations.

It is clear that the Illinois Supreme Court was aware of and acted within the confines of the legislative and regulatory framework as to the boundaries of OSHA/FRA jurisdiction.

II. FEDERAL PRECEDENT DOES NOT SUPPORT A TERRITORIAL APPROACH TO FRA REGULATION

North Western contends that federal precedent has established a territorial approach to preemption such that whenever the FRA exercises its statutory authority over a particular working condition within a given "environmental area" such as bridges, that operates to preempt OSHA from regulating any other working condition within that "environmental area." (Pet. at 16). Such is not the law.

This same contention was considered and rejected in *Southern Pacific Transp. v. Usery*, 539 F.2d 386 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977), because such an approach could result in preemption beyond that actually intended by the FRA. 539 F.2d at 391, n. 10.

Further, one year after *Usery*, the FRA issued its 1978 Policy Statement expressly rejecting this type of "territorial" approach as unworkable. The FRA stated:

> FRA has determined that a territorial approach to the exercise of its statutory jurisdiction over railroad safety such as that proposed in the NPRM would deplete energies and resources better devoted to the safety of railroad operations.

43 Fed.Reg. at 10587 (p. A51).[2]

Given the FRA's rejection of the territorial approach to regulation, it is incorrect to assert that the FRA's exercise of authority over one aspect of bridge work preempts OSHA from regulating all other aspects of bridge work. The Illinois Supreme Court's opinion is consistent with all federal decisions on the issue of FRA's displacement of OSHA regulation.

III. THE FRA'S 1978 POLICY STATEMENT DID NOT PREEMPT OSHA FROM ALL ASPECTS OF BRIDGE WORK

North Western contends that in the 1978 Policy Statement the FRA declared that no OSHA regulations may be enforced on railroad bridges. In support of this contention North Western takes eight words, out of context, from the six page Policy Statement, "*OSHA regulations would not apply to . . . railroad bridges*," and states that those words "plainly include railroad bridges within the FRA's exclusive jurisdiction." (Pet. at 17). This statement is untrue.

Section C of the 1978 Policy Statement is entitled "OSHA Jurisdiction". 43 Fed.Reg. at 10587 (p. A51). In that section of the Policy Statement the FRA analyzes sixteen subparts of OSHA, stating generally whether or not those subparts would apply to the railroad industry. With regard to "Subpart D, walking-working surfaces," the FRA stated that those regulations would apply to railroads with

[2] Both the official citation and the corresponding page number in North Western's Appendix are provided where available.

three exceptions.[3] The pertinent portion of that section is set out below:

> WALKING-WORKING SURFACES
> (SUBPART D)
>
> OSHA regulations concerning working surfaces deal with such matters as ladders, stairways, platforms, scaffolds and floor openings. Generally, these regulations are applicable in railroad offices, shops, and other fixed work places. There are three principal exceptions to the rule. First, they would not apply with respect to the design of locomotives * * *
>
> Second * * * OSHA regulations on guarding of open pits, ditches, etc., would not apply to inspection pits in locomotive or car repair facilities. * * *
>
> Third, the OSHA regulations would not apply to ladders, platforms, *and other surfaces* on signal masts, cantenary systems, railroad bridges, turntables, and similar structures or to walkways beside the tracks in yards or along the right-of-way.

43 Fed.Reg. at 10587 (p. A53) (emphasis added).

It is from the third exception that North Western quotes the words, "OSHA regulations would not apply to . . . railroad bridges." Placing these words in context makes it clear that the only regulations being referred to are the "walking-working surface" regulations. This is precisely the reading given this language by the court in *Southern Pacific Transp. Co. v. Public Utilities Comm'n of California*, 647 F.Supp. 1220, 1224, *aff'd per curiam*, 820 F.2d 1111 (9th Cir. 1987).

---

[3] OSHA's "walking-working surface" regulations deal with the guarding of openings and require the use of railings, toeboards and hole covers to be placed over or around an opening in a floor or wall surface. See, 29 C.F.R. §1910.23.

North Western's interpretation of this passage violates all rules of grammar and syntax. Taking words from the FRA's discussion of one subpart of OSHA and applying them to all subparts defeats the FRA's purpose in discussing those subparts separately. In effect, North Western has rewritten the Policy Statement to support its position.

More importantly, the FRA, in the only interpretive statement it has issued on this topic, has itself confirmed that North Western has misread this language. In a Notice of Proposed Rulemaking (NPRM) dated January 30, 1991, the FRA considered the necessity of promulgating its own fall protection regulations and the adequacy of what it referred to as the "currently applicable OSHA fall protection regulations." 56 Fed.Reg. at 3434 (1991) (p. A67). In the 1991 NPRM the FRA expressly stated that the 1978 Policy Statement did not preempt the OSHA fall protection regulations and that the words, "OSHA regulations would not apply to . . . railroad bridges" only referred to the "walking-working surface" regulations, not the "fall protection" regulations. The FRA stated:

> As this segment of the Policy Statement indicates, FRA intended to displace OSHA regulations with respect to the *surfaces* on bridges, *i.e.*, track structures, *but did not intend* to prevent OSHA from exercising its more general responsibilities for the safety of railroad workers with respect to *fall protection* and respiratory equipment.

56 Fed.Reg. at 3435 (p. A70) (emphasis added).

It is clear that the preempting language from the 1978 Policy Statement relied upon by North Western did not apply to the OSHA fall protection regulations.

IV. THE ILLINOIS SUPREME COURT CORRECTLY RELIED ON THE 1991 NPRM TO INTERPRET THE 1978 POLICY STATEMENT

Contrary to North Western's assertion, the 1978 Policy Statement did not preempt OSHA from regulating all aspects of railroad bridge work, but instead limited preemption to those aspects involving "railroad operations." Since the Policy Statement did not address the question of whether the OSHA fall protection regulations affected the safety of railroad operations, the Illinois Supreme Court properly relied on the FRA's 1991 statement on that point. 603 N.E.2d at 444-45 (pp. A7-8).

The OSHA "fall protection" regulations are part of the personal protective equipment regulations contained in the OSHA construction standards. 29 C.F.R. 1926.104-1926.105. In the Policy Statement the FRA stated that the construction standards apply to railroads except to the extent that they affect the safety of "railroad operations." 43 Fed. Reg. at 10589 (p. A58). "Railroad operations" were defined as the "movement of equipment over the rails." 43 Fed. Reg. at 10585 (p. A46). However, the Policy Statement did not review each construction standard to determine if, in fact, any of those standards did affect railroad operations.

The Illinois Supreme Court recognized that the Policy Statement did not address the issue of whether the OSHA fall protection regulations affected the safety of railroad operations. 603 N.E.2d at 443 (p. A6). Consequently, the Illinois court properly looked outside the Policy Statement for guidance as to the FRA's intent. *Gardebring v. Jenkins*, 485 U.S. 415, 429-30 (1988). The court looked to the FRA's statement in the 1991 NPRM that the fall protection regulations had not been preempted. The court concluded

that the NPRM was a fair interpretation of the 1978 Policy Statement and granted it the deference it legally deserved. 603 N.E.2d at 444-45 (pp. A7-8).

V. THE DISSENTING OPINION IN THE STATE COURT MISINTERPRETED THE 1978 POLICY STATEMENT

North Western naturally places great reliance in the state court's dissenting opinion. However, the dissent has also misread the 1978 Policy Statement with regard to the language "OSHA regulations would not apply to . . . railroad bridges." 603 N.E.2d at 446 (p. A13). Obviously the dissent has no more right than does North Western to take language out of context and apply it in areas not intended by the FRA.

The dissent also misreads the 1978 Policy Statement with respect to the FRA's desire to avoid "piecemeal regulation of individual hazards". 603 N.E.2d at 446 (p. A13). The dissent reasons that the "fall protection" regulations and the "walking-working surface" regulations are both intended to prevent the same hazard, *i.e.*, falls. Therefore, the dissent criticizes the majority's opinion as giving rise to piecemeal regulation of the same hazard. The error in the dissent's reasoning is that it fails to note that when the FRA stated that it did not want piecemeal regulation of the same hazard, it was only referring to hazards which affect railroad operations.

A look at that portion of the Policy Statement where this language came from is revealing. Consistent with its statements throughout the 1978 Policy Statement, in this section the FRA was again expressing its intent that it alone would regulate hazards which affected railroad operations. The FRA stated:

EXERCISE OF FRA JURISDICTION OVER RAILROAD OPERATIONS

> The overall FRA program to assure the safety of railroad operations may be generally subdivided into three fields: (1) Track, roadbed, and associated devices and structures, (2) equipment, and (3) human factors. FRA has now exercised its statutory authority with respect to each of these regulatory fields by actual rulemaking. While it is expected that additional regulatory initiatives may be undertaken, as necessary, in each of the major regulatory fields, it is the judgment of the agency that piecemeal regulation of individual hazards in any of the three regulatory fields by any other agency of government would be disruptive and contrary to the public interest.
>
> * * *
>
> Therefore, as the primary regulatory agency, FRA has exercised and continues to exercise its jurisdiction over the safety of railroad operations.

43 Fed.Reg. at 10586 (p. A48).

The Policy Statement then goes on to describe the dimensions of the three regulatory fields occupied by the FRA. With respect to track, roadbed and associated structures and devices, the FRA stated:

> The FRA Track Safety Standards (49 CFR Part 213) prescribe geometric and other technical standards for track structures and roadbed and require a program of inspections. While standards have not been issued related to the dimensions or structural integrity of bridges, tunnels or other similar structures, FRA is exercising its authority with respect to the operational safety of such structures through inspections in response to specific requests and may undertake rulemaking proceedings at a future date.

43 Fed.Reg. at 10586 (p. A49).

Clearly the FRA's exercise of authority over track structures, including bridges, was restricted to "geometric and other technical standards" related to their dimensions and structural integrity. These are areas which the FRA considered "operational". It is in these operational areas that the FRA wished to avoid piecemeal regulation. The walking-working surface regulations require the use of surface obstructions such as railings and toeboards. Because those items can affect the movement of equipment over the rails, the FRA determined that it was the agency best suited to regulate the hazards associated with those surface regulations. 43 Fed.Reg. at 10587 (p. A54).

The OSHA fall protection regulations, on the other hand, do not affect the movement of equipment over the rails and, therefore, do not affect railroad operations. *Secretary of Labor v. Consolidated Rail Corp.*, OSHRC Docket No. 78-2119, *aff'd on other grounds*, 9 OSHC 1892 (1981).[4] Consequently, OSHA's regulation of fall protection does not result in piecemeal regulation of a railroad operating hazard. The fall protection regulations simply have nothing to do with railroad operations.

There is both logic and reason in the FRA's distinction between operational and nonoperational hazards. The dissent cannot substitute its limited knowledge of the hazards presented for that of the agency charged with that specific responsibility.

---

[4] A certified copy of this unpublished decision appears at page one of Respondent's Appendix.

VI. FEDERAL CASE LAW DOES NOT SUPPORT FRA'S EXCLUSIVE JURISDICTION OVER RAILROAD BRIDGES

In an attempt to persuade this Court that the Illinois Supreme Court's opinion conflicts with federal precedent, North Western cites three cases which it claims held that OSHA was preempted from regulating all aspects of work performed on railroad bridges. However, none of those cases so hold.

The first case cited by North Western is *Velasquez v. Southern Pacific Transp. Co.*, 734 F.2d 216 (5th Cir. 1984). (Pet. at 22). However, the Illinois Supreme Court carefully reviewed *Velasquez* and found it was distinguishable on its facts. 603 N.E.2d at 445 (pp. A9-10). In *Velasquez*, the plaintiff fell from a railroad bridge nine feet to the ground below. The OSHA fall protection regulations only apply to work done at heights above 25 feet. Therefore, the *Velasquez* court was not faced with the issue of whether OSHA fall protection regulations were applicable to railroad bridges. Rather, that case dealt exclusively with the issue of whether OSHA "walking-working surface" regulations applied to walkways on railroad bridges.

In a footnote which is purely *dicta*, the *Velasquez* court stated that the 1978 Policy Statement displaces the OSHA construction standards "in this case". 734 F.2d at 218, n. 1. In making this gratuitous comment, the court failed to follow the FRA's admonition that the OSHA construction standards would be preempted only to the extent that they fell "within FRA's exercise of authority relating to the safety of railroad operations." 43 Fed.Reg. at 10589 (p. A58). Since the *Velasquez* court never looked at the OSHA construction standards individually to determine which, if any, affected the safety of railroad operations,

it had no basis for displacing the entire set of those standards.

Further, even if the *Velasquez* court incorrectly read the Policy Statement to preclude all OSHA regulations from railroad bridges, that portion of its decision lost all meaning in light of the 1991 NPRM wherein the FRA confirmed that such a reading was incorrect. After all, it is the agency's intent, not the court's, which controls the scope of preemption. *Southern Pacific Transp. Co. v. Usery*, 539 F.2d 386, 392 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977). Given the unequivocal pronouncement of FRA intent in the 1991 NPRM, even the *Velasquez* Court would have to concede that the OSHA fall protection regulations were not preempted by the 1978 Policy Statement.

The second case cited by North Western, *Norfolk & W. Ry. v. Public Utilities Comm'n of Ohio*, 727 F.Supp. 367, *aff'd*, 926 F.2d 567 (6th Cir. 1991), only concerned the issue of whether the FRA had preempted individual states from requiring walkways on bridges. It did not discuss jurisdiction over working conditions on bridges. Since the FRA rejected a "territorial" approach to regulation, the fact that it exercised its jurisdiction as to walkways on bridges says nothing as to its position regarding other aspects of bridge work.

Finally, North Western cites *Norfolk & W. Ry. v. Burns*, 587 F.Supp. 161 (S.D. Mich. 1984). That case does not support complete preemption of OSHA regulations on bridges. In *Burns*, the railroad was cited for the improper storage of material on a walkway beside the track. 587 F.Supp. at 163. The court concluded that the 1978 Policy Statement only preempted regulations which would affect the actual surface condition of the walkway, not those regula-

tions aimed at controlling nonoperational hazards. 587 F.Supp. at 170-71. *Burns* illustrates the FRA's intent with respect to overlapping jurisdiction of certain work areas with respect to operational versus nonoperational hazards.

North Western also relies upon the OSHA Review Commission case of *Secretary of Labor v. Consolidated Rail Corp.*, 10 OSHC 1577 (1982). However, that case dealt exclusively with whether OSHA "walking-working surface" regulations were applicable to the guarding of open-pits in locomotive repair shops. 10 OSHC at 1580. Nowhere in that decision did the Review Commission discuss the applicability of any OSHA regulations to railroad bridge work.

Moreover, North Western fails to discuss the OSHA Review Commission case of *Secretary of Labor v. Consolidated Rail Corp.*, OSHRC Docket No. 78-2119, *aff'd on other grounds*, 9 OSHC 1892 (1981), which specifically held that the 1978 Policy Statement did not preempt the OSHA fall protection regulations. (RA at 1).[5]

In that case the railroad was cited by OSHA for failing to provide safety belts to workers who were engaged in repairing a bridge deck 34 feet above the ground. (RA at 4-5). The railroad argued that it was exempt from the OSHA fall protection regulations because the 1978 Policy Statement had preempted OSHA from applying its safety regulations to bridges. (RA at 7). The administrative law judge rejected this claim because the railroad failed to show that the fall protection regulations affected railroad operations. The ALJ stated:

---

[5] References to Respondent's Appendix are noted as "(RA at ____)."

> The hazardous working conditions in this case did not fall within any purported exercise of FRA's authority relating to the "safety of railroad operations" which would prevent OSHA's standards from applying.[6]

(RA at 8-9) (emphasis added).

The Illinois Supreme Court opinion clearly does not conflict with any precedent with regard to preemption of OSHA regulations on railroad bridges. As such the Petition for Writ of Certiorari should be denied.

VII. THERE ARE NO STATEMENTS OF FRA INTENT WHICH ARE INCONSISTENT WITH THE ILLINOIS COURT'S OPINION

North Western contends that the opinion of the Illinois Supreme Court conflicts with "all reasonably contemporaneous expressions of FRA intent" which establish FRA's exclusive jurisdiction over all work performed on railroad bridges. (Pet. at 18). However, none of the "expressions" cited by North Western in support of this contention discuss working conditions on railroad bridges.

---

[6] The railroad appealed this decision to the full Commission. The Commission affirmed, but on the ground that the Policy Statement was not a valid exercise of FRA authority. The full Commission never even considered the lower judge's ruling that the fall protection regulations did not affect the safety of railroad operations. 9 OSHC 1892 (1981).

One year later, in a totally different action, *Secretary of Labor v. Consolidated Rail Corp.*, 10 OSHC 1577 (1982), the full Commission expressly overruled the basis for its affirmance in the earlier *Consolidated Rail* case and held that the 1978 Policy Statement was a valid exercise of FRA authority. However, that decision did not question the lower court's original finding that the 1978 Policy Statement did not preempt the OSHA fall protection regulations.

The first "expression" of FRA intent cited by North Western is a memorandum from the General Counsel of the Department of Transportation concerning the FRA's interpretation of Section 4(b)(1) of OSHA. (Pet. at 19). This memorandum, which deals solely with an FRA/OSHA dispute as to how, in general, preemption could be effected, does not discuss exclusive jurisdiction over all work performed on railroad bridges.

North Western next cites two FRA announcements which deal with the issue of whether the FRA should require the installation of walkways on all railroad bridges. (Pet. at 19). Neither of those announcements discuss the issue of whether the FRA retained exclusive jurisdiction over all working conditions on railroad bridges.

North Western claims that in the case of *Secretary of Labor v. Consolidated Rail Corp.*, 10 OSHC 1577 (1982), the OSHA Review Commission agreed that the FRA had assumed exclusive control over bridges. However, the sole issue in that case was whether the FRA's 1978 Policy Statement preempted OSHA's walking-working surface regulations from being applied in locomotive repair shops. 10 OSHC at 1578-79. That case had nothing whatsoever to do with railroad bridges.

North Western's reliance on the letter of then FRA Administrator, John M. Sullivan, which was noted by the Review Commission in the *Consolidated Rail* case, similarly fails to aid North Western's argument. 10 OSHC at 1579, n. 8. That letter simply repeats what the FRA had stated in the 1978 Policy Statement, *i.e.*, that the FRA has exercised its jurisdiction over "railroad operations." (Pet. at 20). The letter does not announce FRA's exclusive jurisdiction over railroad bridges.

The next expression of "contemporaneous" FRA intent cited by North Western is a letter dated March 7, 1989, from the Assistant Chief Counsel for Safety of the FRA to the Associate Solicitor for the Department of Labor. (Pet. at 20). Ostensibly, this letter was meant to respond to a specific question posed by OSHA, to wit: "Does [FRA] have regulations to ensure that fall protection equipment is provided where appropriate?" FRA counsel answered that question in the negative, but with the proviso that because of the Congressional mandate contained in the Rail Safety Improvement Act of 1988, "we expect to publish in the near future a Notice of Proposed Rulemaking concerning the safety of railroad employees working on bridges." (p. A82). North Western asserts that this response is indicative of FRA's intent in 1978 "that fall protection for railroad bridge workers should not concern OSHA." (Pet. at 20). Respondent is at a loss to explain how a letter drafted in 1989, expressing FRA's intent to regulate fall protection in the future, has any relevance to the FRA's position on preemption of OSHA fall protection regulations in 1978.

North Western also points to one section of the Rail Safety Improvement Act of 1988, 45 U.S.C. §431(n) (1988), which required the FRA to promulgate safety regulations for workers on bridges, including regulations as to walkways, safety belts and nets. However, the Respondent has never contested the FRA's *authority* to regulate bridge safety. That section of the Act merely serves to demonstrate Congressional recognition of the FRA's *failure to exercise that authority* and a mandate to it to do so.

Finally, North Western contends that the FRA's issuance of fall protection regulations in 1992 indicates FRA's belief, in 1978, that OSHA's fall protection regulations affected railroad operations. However, this contention is

directly contradicted by the FRA's statement in the 1991 NPRM. There, the FRA stated that through the issuance of its own fall protection regulations it was now "extending its authority" to all aspects of railroad bridge worker safety, "both operational and otherwise." 56 Fed.Reg. at 3435-36 (p. A71). This clearly establishes that the FRA has never considered "fall protection" to be an operational concern.

Contrary to North Western's position, the Illinois Supreme Court opinion in no way conflicts with any statement of FRA intent. Rather, that opinion is entirely consistent with the 1991 NPRM.

VIII. THE 1991 NPRM IS ENTITLED TO GREAT DEFERENCE

In it's 1991 NPRM the FRA put to rest any question there might be with regard to the applicability of OSHA's fall protection regulations by expressly stating that the 1978 Policy Statement did not preempt those regulations. Faced with this unequivocal statement, North Western attempts to dilute its importance by labelling it a "retroactive interpretation" which is not entitled to any weight. North Western is in error. The 1991 NPRM is the only statement of intent ever issued by the FRA with regard to fall protection. As such, it should be given great deference by the courts.

A. THERE IS NO PER SE RULE AGAINST UTILIZING AN AGENCY'S SUBSEQUENT INTERPRETATION OF ITS OWN REGULATION

North Western contends that the 1991 NPRM is not worthy of this Court's deference because it is not a contemporaneous interpretation of the Policy Statement.

However, North Western fails to cite a single case which holds that an agency's interpretation must be contemporaneous in order to be considered as evidence of the agency's intent.

An agency's interpretation of its own policy is entitled to great deference. *Udall v. Tallman*, 380 U.S. 1, 16 (1965). A court need not find that an agency's interpretation of its regulation is the only possible one, or even the one that the court would have adopted in the first instance. *San Luis Obispo v. NRC*, 789 F.2d 26, 30 (D.C. Cir. 1986). As this Court repeated in *Udall*:

> [A] court must necessarily look to the administrative construction of [a] regulation if the meaning of the words used is in doubt. * * * [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

380 U.S. at 16-17, quoting from *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14 (1945).

The 1991 NPRM is merely the FRA's attempt to clarify an earlier FRA pronouncement which had only been intended as a guideline and not as a definitive statement of FRA's position regarding preemption of each individual OSHA regulation. The FRA included the following precaution in the Policy Statement:

> This discussion cannot be regarded as definitive, since considerable experience in adjusting the relationship of FRA and OSHA standards will likely be required before an optimum Federal regulatory program can be achieved. All statements concerning OSHA and FRA authority and the applicability of individual regulations should be regarded as statements of general principle.

43 Fed.Reg. at 10587 (p. A52).

In this way the FRA gave notice to the regulated community that the general principles contained in the Policy Statement were subject to future interpretation. In 1991, the FRA felt it appropriate to issue such an interpretation in its NPRM. This is clearly proper. *Gardebring v. Jenkins*, 485 U.S. 415, 429-30 (1988); *Youakim v. Miller*, 425 U.S. 231, 235 (1976), *aff'd after remand*, 440 U.S. 125 (1979).

In both *Gardebring* and *Youakim* this Court paid great deference to the agencies' interpretations of their own rules which had been issued *after* the litigation in those cases was initiated. In *Gardebring*, the administrative agency was actually a party to the litigation, yet, despite this fact, this Court noted that when it comes to an agency's subsequent interpretation of its own regulation, courts should be:

> hesitant to substitute an alternative reading for the [agency's] unless that alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation.

485 U.S. at 430.

North Western cites five cases which it claims held that subsequent administrative interpretations are not entitled to significant weight. (Pet. at 24). However, none of those cases so held. Three of those cases merely state that an agency's interpretation cannot be used to determine the meaning of a statute which is clear on its face. *Order of Railway Conductors v. Swan*, 152 F.2d 325 (7th Cir. 1945), *aff'd*, 329 U.S. 520 (1947); *Land O'Lakes Creameries, Inc. v. Commodity Credit Corp.*, 265 F.2d 163 (8th Cir. 1959); and *Drew v. Lawrimore*, 257 F.Supp. 659 (D.C.S.C. 1966). The 1978 Policy Statement was not intended as a final

resolution of all questions concerning FRA's preemption of OSHA regulations. Therefore, the 1991 NPRM is not interpreting a regulation that is clear on its face, but rather one that was clearly subject to future interpretation.

The remaining two cases cited by North Western do not involve agency interpretation, but rather deal with the role of *subsequent legislative history* in the interpretation of a statute. *Matter of Sinclair*, 870 F.2d 1340 (7th Cir. 1989); *Wisconsin Cheesemen, Inc. v. United States*, 388 F.2d 420 (7th Cir. 1968). Regardless of the value placed on subsequent legislative history, this Court has recognized the value of an agency's subsequent interpretation of its own regulation. *Gardebring*, 485 U.S. at 430.

In the present case, the plain language of the 1978 Policy Statement does not conflict with the 1991 NPRM. Further there are no earlier FRA pronouncements which conflict with the 1991 NPRM, that being the *only* expression of FRA intent ever issued on this subject. As such, it was totally appropriate to consider the 1991 NPRM as evidence of the FRA's intent with respect to OSHA fall protection.

B. THE 1991 NPRM IS NOT A RETROACTIVE INTERPRETATION OF THE 1978 POLICY STATEMENT

North Western asserts that the 1991 NPRM is a retroactive interpretation of the FRA's 1978 Policy Statement. It further asserts that a court will not defer to an agency's subsequent interpretation of its policies where to do so "would intrude upon reasonable reliance interests." (Pet. at 24), citing *Heckler v. Community Health Serv.*, 467 U.S. 51 (1984); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *Atchison, T. & S.F. R.R. v. Wichita Bd. of Trade*, 412 U.S. 800 (1973); *SEC v. Chenery Corp.*, 332

U.S. 194 (1947). In so doing, North Western has confused the actual principle espoused in those cases with what is claimed here to be a "retroactive interpretation."

The principle announced in *Heckler* is that an "administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests." 467 U.S. at 60, n.12. In the present case the 1978 Policy Statement was not issued to announce a rule, but only to provide a statement of "general principle" which would be subject to future adjustment. 43 Fed. Reg. at 10587 (p. A52). As such, there was no "rule" announced in the Policy Statement for North Western to rely on.

The cases of *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), and *Atchison, T. & S.F. R.R. v. Wichita Bd. of Trade*, 412 U.S. 800 (1973), similarly do not support North Western's position. Those cases state that reliance on an agency's past decisions may entitle a party to act in accordance with those decisions. Here, there are no past decisions. The 1991 NPRM is the only decision ever released by the FRA on this issue.

Finally, the case of *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), says nothing about reliance interests. In that case this Court expressly recognized the right of an administrative agency to issue a new rule or policy as part of an enforcement proceeding. This was true in *Chenery* even though it resulted in retroactive application to the respondent in that proceeding. 332 U.S. at 200-203. As this Court noted in *Chenery*, "every case of first impression has a retroactive effect." 332 U.S. at 203. *Chenery* clearly stands for the proposition that a party has no right to be free of agency enforcement in cases of first impression simply because the policy sought to be enforced has not previously been settled.

North Western makes a chimerical attempt to develop a "motive" for the FRA's issuance of the 1991 NPRM. North Western asserts that the reason the FRA denied that the OSHA fall protection regulations had been preempted by the 1978 Policy Statement was to deflect criticism from itself for failing to act sooner to develop its own fall protection regulations. (Pet. at 25). This is nothing more than pure speculation. Indeed, it was North Western itself that prompted the FRA's comments on this issue.

By letter dated July 18, 1990, North Western provided the FRA with portions of the brief it filed with the Illinois Appellate Court in this case.[7] In that letter North Western attempted to convince the FRA that the 1978 Policy Statement preempted application of OSHA fall protection regulations on railroad bridges. In the NPRM the FRA acknowledged that it had "recently received" a number of "legal memoranda" from various railroads regarding the meaning of that portion of the 1978 Policy Statement dealing with the walking-working surface regulations and, therefore, it wanted to clarify that issue. 56 Fed.Reg. at 3435 (p. A70). Having asked the FRA for clarification and the FRA having responded in a manner adverse to North Western's interests, North Western now attacks the FRA's motives in a pathetic attempt to discredit the 1991 NPRM.

The 1991 NPRM is consistent with the 1978 Policy Statement and, as such, should be given controlling weight.

---

[7] A copy of this 18 page "letter-memorandum" is part of the record below.

IX. NOTHING IN THE ILLINOIS SUPREME COURT'S OPINION IS VIOLATIVE OF NORTH WESTERN'S RIGHT TO DUE PROCESS

As its final argument, North Western claims that it was denied due process. The basis for this claim is the Illinois Supreme Court's finding that the 1978 Policy Statement was ambiguous regarding whether or not OSHA's fall protection regulations were preempted. North Western claims that if the Policy Statement was ambiguous, then charging it with a violation of those regulations violates due process. North Western's allegations are completely without merit.

All that due process requires is a fair and reasonable warning of the conduct sought to regulated. *Faultless Division v. Secretary of Labor*, 674 F.2d 1177, 1185 (7th Cir. 1982). The only evidence presented below was that North Western had fair and reasonable warning of the conduct sought to be regulated because it knew that OSHA was applying its fall protection regulations to railroads. Following publication of the 1978 Policy Statement, but prior to the date of the accident in this case, the following events occurred:

(1) North Western was cited twice by OSHA for failing to provide fall protection for bridge workers;[8]

(2) OSHA published a decision in which it was reported that a Review Commission judge had decided that the 1978 Policy Statement did not

---

[8] See letter dated February 12, 1981, from the "General Attorney" of the Chicago & North Western Transportation Co. to the Assistant vice-president for Accident and Loss Prevention for North Western. This letter is part of the record below, having been admitted in evidence to show North Western's notice of the danger. (RA at 18 and pp. 1112-14 of the trial transcript.).

> preempt OSHA fall protection regulations on railroad bridges.[9]

Those events clearly put North Western on notice that OSHA was enforcing its fall protection regulations on railroad bridges. Given this notice, it is inconceivable that North Western could claim that it was unaware of the conduct expected of it. *Corbesco, Inc. v. Dole*, 926 F.2d 422, 428 (5th Cir. 1991).

North Western has cited a number of cases in support of its contention that the ambiguity of the Policy Statement violated its due process rights. However none of those cases are germane to the issue here because in those cases the defendants had a right to rely on the particular statutes or regulations involved in those cases as setting forth the conduct required. In the instant case it was not reasonable for North Western to rely on the 1978 Policy Statement based upon its knowledge of OSHA's enforcement of the fall protection regulations.

Further, North Western did nothing between the issuance of the 1978 Policy Statement and the issuance of the 1991 NPRM in an attempt to get clarification from the FRA on what it now contends was an ambiguous Policy Statement. Instead North Western chose to rely on its own interpretation of the 1978 Policy Statement even though that statement contained the express provision that its discussion of OSHA jurisdiction should not be considered definitive. 43 Fed.Reg. at 10587 (p. A52). Given this disclaimer, at the very least, North Western had an obligation to inquire of the FRA whether OSHA had been

---

[9] *Secretary of Labor v. Consolidated Rail Corp.*, 9 OSHC 1892 (1981). See footnote 6 and related text, *infra*, Section VI.

preempted as to fall protection. *Corbesco, Inc. v. Dole*, 926 F.2d 422, 428 (5th Cir. 1991); *Texas E. Prods. Pipeline Co. v. OSHA Review Comm'n*, 827 F.2d 46, 50 (7th Cir. 1987); *Fluor Constructors, Inc. v. OSHA Review Comm'n*, 861 F.2d 936, 942 (6th Cir. 1988).

Nor can North Western claim it based its conduct in this case in reliance on the court's decision in *Velasquez v. Southern Pacific Transp. Co.*, 734 F.2d 216 (5th Cir. 1984), since that decision was issued on June 14, 1984, almost six months after the accident in this case.

Consequently, since North Western had no right to rely on the Policy Statement, the admission of the OSHA fall protection regulations as evidence of negligence in this case in no way violated North Western's due process rights.

CONCLUSION

The Illinois Supreme Court's opinion is entirely consistent with all federal precedent and statements of legislative and administrative intent with regard to the scope of OSHA jurisdiction in the railroad industry. That opinion does nothing to change the established jurisdictional boundaries between OSHA and the FRA. Further, there is no important question of federal law which needs to be settled by this Court as the FRA has now adopted its own fall protection regulations which do preempt OSHA. Consequently, there is nothing in North Western's peti-

tion which warrants this Court's review. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM J. BURKE
Counsel of Record
JAMES T. DEMOS
LINDA LEONETTI-GRAVES
DEMOS & BURKE
77 West Wacker Drive
Suite 600
Chicago, Illinois 60601
(312) 263-4388
Counsel for Respondent

Of Counsel:

DAVID A. NOVOSELSKY
DAVID A. NOVOSELSKY & ASSOCIATES
120 North LaSalle Street
Suite 1400
Chicago, Illinois 60602
(312) 346-8930

RESPONDENT'S APPENDIX

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

SECRETARY OF LABOR, Complainant,	)	
v.	)	OSHRC DOCKET
	)	NO. 78-2119
CONSOLIDATED RAIL CORPORATION, Respondent.	)	

Appearances:

Francis V. LaRuffa, Regional Solicitor
United States Department of Labor
1515 Broadway, Room 3555
New York, New York 10036
Attorney for Complainant
by Douglas Weiner, Esq., of Counsel

John R. Jenchura, Esq.
Consolidated Rail Corporation
1138 Six Penn Center Plaza
Philadelphia, Pennsylvania 19103

and

Jones, Day, Reams & Pogue, Esqs.
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorneys for Respondent

DECISION AND ORDER

DITORE, J.:

PRELIMINARY STATEMENT

Respondent contested a citation for a serious violation of 29 CFR § 1926.28(a), a citation for a serious violation of 29 CFR § 1926.500(d)(1), or, in the alternative, Section 5(a)(1) of the Act, and the total penalty of $1,2600.00 [sic] proposed for the alleged violations.

Specifically Respondent was charged with the failure on March 29, 1978, to protect its employees by the use of safety belts and lines (29 CFR § 1926.28(a))[1] and standard railings (29 CFR § 1926.500(d)(1)[2] and Section 5(a)(1) of the Act),[3] from fall hazards of 34 or more feet at a workplace located at Passaic Avenue, Nutley, New Jersey.

---

[1] The standards and the section of the Act cited are as follows:

"§ 1926.28 *Personal protective equipment.*

(a) The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees."

[2] § 1926.500(d)(1)

"(d) *Guarding of open-sided floors, platforms, and runways.* (1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing or the equivalent, as specified in paragraph (f)(1)(i) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a standard toeboard wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard."

[3] *Section 5(a)(1) of the Act*

"Sec. 5.(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;"

The action was heard at New York, New York on September 28, 1978.

ISSUES

1. Whether Respondent is exempt from the provision of the Occupational Safety and Health Act of 1970 pursuant to Section 4(b)(1) of the Act.

2. If Respondent is not exempt, whether the violations described in the citation and complaint existed at Respondent's workplace on March 29, 1978.

3. If the violations existed, whether any of Respondent's employees were exposed to the hazards created by the violations.

4. If employees were exposed, whether the hazards were serious and whether Respondent knew of the hazards.

5. If the hazards were serious and Respondent had knowledge of the hazards, whether Respondent is responsible for the violations.

6. If Respondent is responsible, whether the penalties proposed are proper and reasonable.

STATEMENT OF THE EVIDENCE

On or about March 28, 1978, a freight train derailment on a trestle bridge owned and operated by Respondent, damaged a number of railroad ties on the bridge (T. 9, 34, 102). The railroad trestle bridge was approximately 300 feet long and spanned Passaic Avenue in Nutley, New Jersey. The top of the bridge (track bed) was 34 feet, 8 inches above the highway (T. 28, 33, 103, 133-134; Exhs. G-8, G-17).

Respondent dispatched a work crew consisting of a carpentry gang of five men and a track gang of four to five men, to the location to repair and replace the damaged railroad ties (T. 84, 105, 109). The trestle bridge accommodated a single track and was as wide as the width of a freight car. During the time it took to make the necessary repairs, no railroad traffic moved over the bridge (T. 131).

On March 29, 1978, pursuant to a complaint, Compliance Officer Nicholas Nardiello of OSHA, inspected Respondent's worksite on the bridge (T. 23, 26, 27). Nardiello observed between ten and twelve of Respondent's employees removing damaged railroad ties from the track bed and carrying them off the bridge (T. 133). The railroad ties supported the track on the bridge. Each tie weighed about 125 pounds and required two to four men to remove it from the track bed and carry it off the bridge (T. 33, 36, 40, 103, 106; Exhs. G-9, G-18). Damaged ties were removed from the track bed in groups of four or five. As each damaged tie was removed, an open space was created on the track bed which increased in size, up to five feet, depending on the number of ties removed. From the openings to the ground below was a distance of 34 feet, 8 inches (T. 28, 31-32, 33, 35, 38, 138; Exhs. G-2, G-4, G-5, G-6, G-15). After the ties were removed from the track bed, they were carried off the bridge by Respondent's employees who walked along the east side edge of the bridge (T. 33, 35, 37, 38; Exhs. G-3, G-7, G-6, G-11, G-12, G-13, G-14, G-17).

Since the openings created by the removal of the damaged ties and the open sides of the bridge were unprotected, Officer Nardiello believed that Respondent's employees were exposed to fall hazards of approximately 34 feet (T. 28, 31-32, 34, 37, 38). None of Respondent's em-

ployees were wearing any safety protective equipment, i.e., safety belts and lines (T. 28). Nardiello believed Respondent's failure to protect its employees from the fall hazards created by the openings in the track bed was a violation of 29 CFR § 1926.28(a), and the failure to protect the employees from the unguarded open sides of the bridge was a violation of 29 CFR § 1926.500(d)(1) or of Section 5(a)(1) of the Act (T. 28, 38, 43, 45, 82).

On the second day after the inspection, Respondent removed its employees from the bridge and ceased all repair work until it obtained safety belts and lines which its employees were required to wear during the completion of the repair work (T. 55-56, 113, 114, 116).

Subsequent to the issuance of the citation and after a conference with Respondent's representatives, Complainant was convinced that the standard railing protection required by 29 CFR § 1926.500(d)(1), for the open sides of the bridge was not feasible. The only feasible method of abating the fall hazards created by the open sides of the bridge and the openings in the track bed was by a lifeline strung down the center of the track bed to which Respondent's employees could attach their safety belts and lanyards (T. 44, 46, 57, 114, 115). Respondent utilized this abatement method to complete its repair work on the bridge (T. 114, 115). The use of this method created no tripping or tangling problems or hazards for the employees in completing the repairs on the bridge (T. 115).

Officer Nardiello recommended an adjusted proposed penalty of $630.00 for each of the two serious violations with credits allowed only for size (T. 68, 69). Although there are several nonserious prior settlements, there is no prior history of record involving violations for the standards cited or any other serious violation (T. 6, 90).

Respondent does not dispute the facts as they relate to the repair work being done or to the hazards created. Respondent does claim that it is not the custom of the railroad industry to require the use of safety protective equipment when repairing railroad ties on a bridge; and that the use of safety lines and belts could create a tripping hazard for its employees doing such repair work (T. 105, 106-109, 110-111, 118-119, 135, 137, 138, 140).

Respondent also raises a Section 4(b)(1) affirmative defense and claims it is exempt from complying with the standards cited herein. Except for the introduction into evidence of a policy intent statement of the Federal Railroad Administration, this issue is confined to arguments made in the parties' post-trial briefs (T. 12-13, 19-22, 119-122; Exh. R-2, R-2A).

At the end of the entire case, the Section 5(a)(1) violation was separated from the citation (No. 1, item 2) and vacated on the ground Complainant failed to carry his burden on that issue (T. 158, 160). Respondent further moved to merge the 29 CFR § 1926.500(d)(1) violation into the 29 CFR § 1926.28(a) violation. Decision was reserved on this motion (T. 158).

OPINION

1. *Section 4(b)(1) Affirmative Defense*

Respondent raises an affirmative legal defense predicated on section 4(b)(1) of the Occupational Safety and Health Act of 1970 (the Act). No evidence was presented at the hearing by Respondent on this defense except for Exhibit R-2 (policy statement of FRA). The defense is argued and discussed in the post-hearing briefs of the parties. In its brief, Respondent contends that the Federal Railroad Administration (FRA) had exercised its statutory

authority to regulate the area of the safety of railroad operations which includes the work area where Respondent's employees were employed at the time of the alleged violations herein. This alleged exercise of statutory authority by FRA foreclosed the Occupational Safety and Health Administration from applying its safety standards to Respondent's workplace.

The basis for Respondent's position is a policy statement issued on March 14, 1978, by the FRA (42 Fed. Reg. 10583 *et seq.*, Exhibit R-2). The FRA issued the statement for two reasons: (1) as a notification by FRA of its withdrawal of its notice of proposed rulemaking with respect to railroad occupational safety and health standards, and (2) as an explanation in the form of a policy statement, of the respective jurisdictions of FRA and the Department of Labor as to railroad occupational safety and health (p. 10584, Exh. R-2).

In its policy statement FRA states that it "has decided to focus resources and energies for the immediate future on the safety of railroad operations"; that the safety of railroad operations "relates to the conditions and procedures necessary to achieve the safe movement of equipment over the rails" (p. 10585, Exh. R-2); and that it has exercised jurisdiction by actual rulemaking covering tracks, road beds, associated devices and structures, equipment, and human factors—the three component fields comprising the safety of railroad operations (p. 10586, Exh. R-2).

FRA further states in its policy statement that OSHA regulations which are connected with or relate to railroad operations and which may interact with or create operational hazards, might require consultation between FRA and OSHA concerning the interpretation or modification of such standards (p. 10587, Exh. R-2).

FRA continues with a general discussion, as a matter of general principle, of specific subparts of OSHA's occupational safety and health standards including the "Construction Standards" p. 10587, 10589, Exh. R-2). In the short paragraph dealing with OSHA's Construction Standards, FRA states:

> Section 1910.12 of OSHA's General Industry standards provides that the standards contained in 29 CFR Part 1926 relating to construction work are adopted as regulations under section 6 of the OSH Act and shall apply to every "employment" engaged in construction work. "Construction work" is broadly defined to include construction, alteration, and/or repair, including painting and decorating. To the extent that hazardous construction working conditions do not fall within FRA's exercise of authority relating to the safety of railroad operations, the OSHA standards apply according to their terms in the railroad industry. (p. 10589, Exh. R-2).

Although FRA's policy statement speaks of regulations presently existing as to the safety of railroad operations, neither the regulations nor the working conditions they cover are set forth. The general terms of the policy statement indicates that FRA's regulations whatever they may be, are concerned with the land worthiness of railroad rolling stock including tracks, road beds and other devices and appurtenances necessary for the safe operation of a railroad. There is neither evidence of any general or specific regulations nor any indication in the policy statement that FRA exercised authority over the hazardous working condition to which Respondent's employees were exposed. The evidence at the hearing established that while the repairs were being made on the railroad bridge, the bridge was closed to railroad traffic and not opened until the repairs were completed. The hazardous working condi-

tions in this case did not fall within any purported exercise of FRA's authority relating to the "safety of railroad operations" which would prevent OSHA's standards from applying. Further, Respondent neither called nor offered as a witness any responsible official of FRA to support its affirmative defense. Nor is there any evidence that Respondent alerted FRA to the instant action in order to allow FRA to intercede if it wished. The policy statement of FRA in and of itself, is too general and speculative to support Respondent's affirmative defense.

Respondent's reliance on *Usery v. Southern Pacific Transportation Co.*, 539 F.2d 386 (5th Cir., 1976) is misplaced. The Court in *Southern Pacific* at pp 391-392 after determining that section 4(b)(1) of the Act did not establish industry-wide exemptions, stated that

> "[s]ection 4(b)(1) means that any FRA exercise directed at a working condition—defined either in terms of a 'surrounding' or a 'hazard'—displaces OSHA coverage of that working condition."

In order to displace OSHA regulations, the FRA must articulate its regulations either to cover the "working condition" or articulate a formal position that a given working condition should go unregulated or that certain regulations—and no others should apply to a defined subject. See also *Baltimore & Ohio Railroad Company v. OSHRC*, 548 F.2d 1052 (D.C. Cir. 1976), *Southern Railway Company v. OSHRC*, 539 F.2d 335 (4th Cir., 1976), contra: *Secretary of Labor v. Baltimore and Ohio Chicago Terminal Railroad Company*, OSHRC Docket No. 77-1303 (unreviewed ALJ decision, 1978).

FRA's policy statement (Exh. R-2) is not a sufficiently concrete exercise of authority to displace OSHA coverage of the working condition here. Assuming, that FRA's

policy statement is an articulation of its jurisdiction over the safety of railroad operations, it fails to articulate whether the "working condition" hazard here is covered by its regulations or whether the condition should be unregulated. Respondent has failed to carry its burden of proof and its burden of persuasion on this issue.

2. *The Alleged Violations*

The evidence of record clearly establishes that on March 29, 1978, Respondent's employees, replacing damaged railroad ties on Respondent's bridge in Nutley, New Jersey, were exposed to falling hazards of 34 feet, and were not provided with, or required to use, personal protective equipment, i.e., safety belts and lines. The hazards were serious. An employee fall of 34 feet to the ground below could, more likely than not, have resulted in death or serious physical harm to the employee. Not only were the hazards obvious to the naked eye, but Respondent's supervisory employees knew of the hazards that existed. Respondent knew or with the exercise of reasonable diligence, could have known of the hazardous conditions.

a. *Citation No. 1, item 1 — 29 CFR § 1926.28(a)*

This standard places the responsibility upon an employer to require its employees to wear personal protective equipment when the employees are exposed to hazardous working conditions. The evidence not only established the exposure of Respondent's employees to falling hazards but established, and Complainant admitted, that the only way to feasibly protect the employees was by the use of safety belts and lines. At the time of the inspection, Respondent neither provided nor required its employees to wear safety belts and lines when performing railroad tie re-

placement work on the track bed of the bridge. After the inspection, Respondent's employees ceased their work and did not return to complete the work until the safety belt and line method was utilized. The use of the safety belts and lines by Respondent's employees during the completion of their work did not create any greater hazards nor make the work impossible to perform. Respondent is responsible for this violation. Under all the circumstances, including consideration of all the factors of Section 17(j) of the Act, and the cessation of work by Respondent until the hazardous condition could be abated, the proposed penalty of $630.00 is unreasonable. A penalty of $300.00 will be assessed.

b. *Citation 1, item 2 — 29 CFR § 1926.500(d)(1) or Section 5(a)(1) of the Act*

Complainant cited Respondent with a violation of 29 CFR § 1926.500(d)(1) and/or Section 5(a)(1) of the Act for the fall hazards to which Respondent's employees were exposed when walking at the unprotected open side of the bridge. The hazard involved was the same as in item 1 of the citation except that item 1 (29 CFR § 1926.28(a)) related to the openings in the track bed while item 2 related to open sides of the bridge. Both hazards were fall hazards of 34 feet from the bridge which could be feasibly protected against only by the use of safety belts and lifelines.

Since the one standard applicable to the conditions was 29 CFR § 1926.28(a), i.e., safety belts and lifelines, section 5(a)(1) of the Act and/or 29 CFR § 1926.500(d)(1) did not apply. Further, Complainant failed to carry its burden on the Section 5(a)(1) issue, and even if it did, the specific standard, 29 CFR § 1926.28(a), would take precedence

over, and would nullify the application of section 5(a)(1) of the Act. The alternate standard 29 CFR § 1926.500(d)(1) applies to open-sided floors and platforms. It strains credulity to consider a railroad bridge an open-sided floor or a platform as these terms are used in the context of the construction standards. Assuming that § 1926.500(d)(1) was applicable, it was established that compliance with the standard (guardrails or their equivalent) was not feasible. Item 2 of Citation No. 1 and the proposed penalty of $630.00 are vacated.

FINDINGS OF FACT

The credible evidence and the record as a whole establishes preponderant proof of the following specific findings of fact.

1. On March 28, 1978, a railroad derailment damaged railroad ties on a railroad bridge owned and operated by Respondent in Nutley, New Jersey.

2. On March 29, 1978, ten to twelve of Respondent's employees who were removing and replacing the damaged railroad ties, were exposed to fall hazards of 34 feet from the bridge to the ground below.

3. The fall hazards were created by unguarded openings in the track bed on the bridge, and by the unguarded open sides of the bridge.

4. In performing their work, Respondent's employees were neither provided with safety belts and lines, nor required to use such protective equipment.

5. The hazardous fall conditions were serious in that a 34-foot fall through an opening in the track bed, or off the open side of the bridge, by an employee could, more

likely than not, *result in serious physical harm or death* to the employee.

6. The hazardous conditions were clearly visible, and Respondent knew, or with the exercise of reasonable diligence, could have known of the hazardous conditions.

7. Complainant admits that the only feasible method to abate, and to protect the employees from, the fall hazards was by the utilization of safety belts and lines.

8. After the inspection of March 29, 1978, Respondent withdrew its employees from the worksite. When the employees returned to work they used safety belts and lines to complete their work.

9. From the time the repair work commenced to its completion, no railroad traffic used or was permitted to use the bridge.

10. The use of safety belts and lines by Respondent's employees neither created a greater work hazard, nor made their repair work impossible to perform.

11. Standard 29 CFR § 1926.28(a) is the only standard that is applicable to the working conditions herein.

12. Section 5(a)(1) of the Act and 29 CFR § 1926.500(d)(1) are not applicable standards.

13. The policy statement of the Federal Railroad Administration (42 Fed. Reg. 10583, *et seq.*; Exh. R-2) is not an exercise of statutory authority over the working conditions of Respondent's employees on March 29, 1978, and does not foreclose OSHA jurisdiction.

14. Respondent is responsible for the serious violation of 29 CFR § 1926.28(a).

CONCLUSIONS OF LAW

1. Respondent is, and at all times material herein was, engaged in a business affecting commerce within the meaning of section 3(5) of the Act (29 U.S.C. § 652(5)).

2. The Occupational Safety and Health Review Commission has jurisdiction over the subject matter and parties to this action.

3. OSHA jurisdiction is not foreclosed pursuant to Section 4(b)(1) of the Act, by any exercise of statutory authority of the Federal Railroad Administration over the working conditions herein.

4. On March 29, 1978, Respondent was in serious violation of 29 CFR § 1926.28(a) for its failure to protect its employees against fall hazards of 34 feet (Citation No. 1, item 1).

5. On March 29, 1978, Respondent was not in serious violation of 29 CFR § 1926.500(d)(1) and/or Section 5(a)(1) of the Act as these provisions did not apply to the working conditions herein (Citation No. 1, item 2).

6. The fall hazard alleged as the subject matter of Citation No. 1, item 2, is merged with the fall hazard subject matter of Citation No. 1, item 1.

7. Under the circumstances of this case with due consideration to the statutory factors of section 17(j) of the Act, the proposed penalty of $630.00 for the violation of 29 CFR § 1926.28(a), and the proposed penalty of $630.00 for the alleged violation of 29 CFR § 1926.28(a) and/or Section 5(a)(1) of the Act, are vacated. A single penalty of $300.00 is assessed for the merged violations of 29 CFR § 1926.28(a).

ORDER

Due deliberation having been had on the whole record, it is hereby

ORDERED that Citation (No. 1, item 1) for a serious violation of 29 CFR § 1926.28(a) is affirmed, it is further

ORDERED that Citation (No. 1, item 2) for a serious violation of 29 CFR § 1926.500(d)(1) and/or Section 5(a)(1) of the Act is vacated, it is further

ORDERED that the fall hazard subject matter of Citation No. 1, item 2 is merged with the fall hazard subject matter of Citation No. 1, item 1, it is further

ORDERED that the proposed penalty of $630.00 for the serious violation of 29 CFR § 1926.28(a), and the proposed penalty of $630 for the alleged violation of 29 CFR § 1926.500(d)(1) and/or Section 5(a)(1) of the Act, are vacated and a single penalty of $300.00 is assessed.

/s/ JEROME C. DITORE
JEROME C. DITORE
JUDGE, OSHRC

Dated: February 8, 1979
New York, New York

(Letterhead Of)

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
1825 K Street, N.W.
4th Floor
Washington, D.C. 20006-1246
Fax 8/ (202) 634-4008

CERTIFICATION

I, Ray H. Darling, Jr., certify that I am custodian of all official records in cases adjudicated before the Occupational Safety and Health Review Commission including the case of Secretary of Labor v. Consolidated Rail Corporation, OSHRC Docket No. 78-2119. I also certify that the attached decisions are true copies as contained in the Review Commission records in the above case.

In witness thereof, I have set my hand hereto this 28th day of September 1990.

ATTEST: /s/ RAY H. DARLING, JR.
Ray H. Darling, Jr.
Executive Secretary

(Letterhead Of)

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
1825 K Street, N.W.
4th Floor
Washington, D.C. 20006-1246
Fax 8/ (202) 634-4008

AUTHENTICATION

I, Edwin G. Foulke, Jr., Chairman of the United States Occupational Safety and Health Review Commission, do hereby certify that Ray H. Darling, Jr., Executive Secretary of the United States Occupational Safety and Health Review Commission, who signed the foregoing certification, was, at the time of the signing of same, duly commissioned and qualified to that office with full legal powers by the laws of the United States of America to make such certification; that said Ray H. Darling, Jr., had legal custody of the record so certified; and that I believe his signature to such certification is genuine.

In witness thereof, I have set my hand hereto this 28th day of September 1990.

ATTEST: /s/ EDWIN G. FOULKE, JR.
Edwin G. Foulke, Jr.
Chairman

RA18

LAW DEPARTMENT

CHICAGO, February 12, 1981

Mr. W. D. Selman
Assistant Vice President
Accident and Loss Prevention

Re: Employee Safety—Bridge Work

On January 22, 1981, Chicago and North Western Transportation Company was cited by OSHA for not providing safety equipment (i.e., life line, nets) or having adequate railing on Bridge #351 at Milepost 69.64 near Ottawa, Minnesota. This citation was triggered by the death of an employee who fell of [sic] this bridge on January 8, 1981. The Transportation Company has also been cited recently for not providing safety equipment or railings on a bridge near Boone, Iowa.

While it is our position that OSHA does not have jurisdiction over track structures or bridges, their citations point to an underlying problem; namely, employee safety while performing bridge work. I would request your investigation of this matter to determine if there is any effective safety equipment available for bridge work.

Anne E. Valle
General Attorney

ph

cc: Messrs. J. P. Daley
D. J. Owens
J. A. Barnes
M. C. Christensen
H. D. Hahn
R. W. Jones